



DEPT. OF COMMERCE  
AND CONSUMER AFFAIRS

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HEARINGS OFFICE

OFFICE OF ADMINISTRATIVE HEARINGS  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS  
STATE OF HAWAII

In the Matter of	)	PCH-2005-9
	)	
KIDDE FIRE TRAINERS, INC.,	)	HEARINGS OFFICER'S FINDINGS OF
	)	FACT, CONCLUSIONS OF LAW AND
Petitioner,	)	DECISION
	)	
vs.	)	
	)	
DEPARTMENT OF FINANCE, COUNTY	)	
OF HAWAII,	)	
Respondent.	)	
	)	

HEARINGS OFFICER'S FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND DECISION

I. INTRODUCTION

On November 7, 2005, Kidde Fire Trainers, Inc. ("Petitioner") filed its request for administrative hearing to contest the Department of Finance, County of Hawaii's ("Respondent") decision to deny Petitioner's protest. The matter was set for hearing and the Notice of Hearing and Pre-Hearing Conference was duly served on the parties.

At the pre-hearing conference held on November 16, 2005, the parties waived the statutory requirement that the hearing begin within 21 days from receipt of the request for hearing. Accordingly, the hearing was continued from November 23, 2005 to December 1, 2005.

On December 1, 2005, the hearing was convened by the undersigned Hearings Officer. Petitioner was represented by its authorized representative Brian Duffy and Respondent was represented by Craig T. Masuda, Esq. At the conclusion of the hearing, Mr. Masuda agreed to provide the Hearings Officer with a copy of the Agreement that was

received into evidence as part of Exhibit 21, and the Hearings Officer received it on December 21, 2005.

Having reviewed and considered the evidence and arguments presented, together with the entire record of this proceeding, the Hearings Officer hereby renders the following findings of fact, conclusions of law and decision.

## II. FINDINGS OF FACT

1. On August 12, 2005, Respondent issued Invitation for Bid ("IFB") No. 2190 entitled Furnishing and Delivering Mobile Live Fire Training Unit for the Hawaii Fire Department, County of Hawaii. The Notice to Offerors provided in part:

Any request for approval to substitute any item or take exception to any specification, special provision or general condition must be received in writing in the above-named office on or before August 25, 2005. Any questions regarding clarification of any information contained in any bid document must be received in writing in the above-named office on or before August 25, 2005. All potential offerors are advised that the County of Hawaii reserves the right to reject any offer which does not follow these instructions.

Bid opening was to take place on September 13, 2005.

2. On August 25, 2005, Petitioner submitted comments to IFB No. 2190, and requested that Section 21 of the Special Provisions be changed so that liability for liquidated damages be capped in total to be not more than 10% of the contract price. Petitioner also requested that Section 5.5 of the General Terms and Conditions be revised. Petitioner received a verbal response that there could be no changes to the special provisions or general terms and conditions.

3. On September 8, 2005, Respondent issued Addendum No. 1 and extended bid opening to September 20, 2005.

4. Bid opening took place as scheduled and Fireblast 451 Inc. ("Fireblast") was the lowest bidder at \$363,958.00, Pro-Safe Fire Training ("Pro-Safe") was the second lowest bidder at \$419,500.00, Petitioner was the third lowest bidder at \$420,000.00 and Draeger Safety Systems ("Draeger") was the highest bidder at \$445,736.00. It was determined that Fireblast, Pro-Safe and Petitioner's bids were non-responsive and that Draeger was the only responsive bidder. Petitioner's bid was deemed to be non-responsive because it contained a

clearly labeled exception to Article 21 of the Special Provisions of the IFB that stated: "Kidde Fire Trainers, Inc. cannot accept an unlimited assessment of liquidated damages. Kidde Fire Trainers will cap the total amount of liquidated damages at 10% of the contract value." Article 21 of the Special Provisions provided:

Liquidated damages, per Section 6.12 of the General Terms and Conditions for Goods and Services, dated July 1, 1994 shall be assessed at one-tenth of one percent (0.1%) for each day of delay for delivery or installation (if applicable) of any item.

5. On October 4, 2005 Petitioner sent Respondent a letter withdrawing its exception to potential assessment of liquidated damages, and voiding the exception noted in its bid.

6. On October 5, 2005, Respondent sent a letter to Petitioner informing Petitioner that it could not accept modifications to a bid after the opening date.

7. By a letter dated October 6, 2005, Petitioner stated that they were not requesting a change to the Special Provisions, but requested that the liquidated damage amount be limited, which Petitioner believed was within Respondent's authority to do so. Petitioner also argued that a request to limit liquidated damages to 10% of the contract value is a request for an immaterial change to the bid documents that can be ignored or withdrawn because the IFB allowed the bidder to suggest a delivery date. Petitioner requested that Respondent issue an award to Petitioner as the lowest responsible, responsive bidder or that Respondent cancel the subject procurement and issue a new IFB.

8. By a letter dated October 18, 2005, Respondent informed Petitioner that they had no alternative but to award the bid to Draeger and a notice to that effect was posted on October 18, 2005.

9. By a letter dated October 21, 2005, Petitioner filed a protest to the proposed award to Draeger, contending that: (1) the solicitation did not specify a delivery time, (2) Respondent improperly and inconsistently applied the provision that allowed exceptions to be taken to the General Terms and Conditions and Special Provisions and Specifications, (3) Draeger misrepresented its status to being a compliant non-Hawaii business, (4) the solicitation was a competitive sealed proposal or a hybrid IFB/competitive sealed proposal and so exceptions for discussion purposes were authorized and (5) the sole award basis in the procurement documents was to the lowest responsible bidder.

10. On October 28, 2005, Respondent denied Petitioner's protest, as Petitioner's bid was non-responsive at the time of bid opening.

11. In a letter dated November 3, 2005, Petitioner stated that it received redacted and/or other variations of the offers made by Draeger, Pro-Safe and Fireblast on that date.

12. On November 7, 2005, Petitioner filed a request for hearing with respect to Respondent's denial of Petitioner's protest.

13. By a letter dated November 11, 2005, Petitioner itemized what it determined to be material exceptions taken by Draeger, and requested that Respondent rescind the Notice of Award to Draeger and award the contract to Petitioner.

14. By a letter dated November 15, 2005, Respondent informed Petitioner that it would discuss Petitioner's allegations with Draeger and determine whether or not they are material and acceptable under Special Provisions 11 and 13, but that it still considered Petitioner's offer to be non-responsive and therefore, was unable to comply with Petitioner's request that it be awarded the contract.

15. By a letter dated November 22, 2005, Petitioner filed a second protest which alleged that Draeger's submission included four material specification exceptions which mandated immediate termination of the Notice of Award to Draeger, and that Draeger's bid contained an exception to the damages terms and conditions. Petitioner requested that the Notice of Award to Draeger be rescinded and that it be awarded the contract as the lowest responsible offeror.

16. On November 23, 2005, Respondent agreed to allow Petitioner to file a second protest and that it would be consolidated for hearing in PCH-2005-9. Respondent agreed that it would not object to the timeliness of the protest or the procedural aspects of the protest, including the form or manner of the submission.

### III. CONCLUSIONS OF LAW

Petitioner argued that it was the lowest responsive, responsible bidder and its bid should not have been rejected as non-responsive because the issue of liquidated damages was not a material issue. Petitioner also filed a second protest regarding alleged deficiencies in the bid submitted by Draeger. Petitioner has the burden of proving by a preponderance of the

evidence that Respondent's determinations were not in accordance with the Constitution, statutes, regulations, and terms and conditions of the solicitation or contract.

It is not disputed that Petitioner took exception to the liquidated damages section of the IFB, and that the bid Petitioner submitted attempted to amend Special Provisions Section 21 to limit the liquidated damages it may be assessed. Hawaii Administrative Rules ("HAR") § 3-122-97 provides that a bid shall be rejected if it is:

not responsive, that is, it does not conform in all material respects to the solicitation by reason of its failure to meet the requirements of the specifications or permissible alternatives or other acceptability criteria set forth in the solicitation, pursuant to section 3-122-33.

In *Southern Food Groups, L.P. v. Dept. of Educ., et al.*, 89 Hawaii 443, 456-457 (1999) the Hawaii Supreme Court found that material terms and conditions of a solicitation involve price, quantity or quality of the items. The Court described as "insightful" a discussion on bid responsiveness by the United States Court of Claims in *Toyo Menka Kaisha, Ltd. v. United States* 597 F.2d 1371, 1376-77 (Ct. Cl. 1979) which stated:

The requirement that a bid be responsive is designed to avoid unfairness to other contractors who submitted a sealed bid on the understanding that they must comply with all of the specifications and conditions in the invitation for bids, and who could have made a better proposal if they imposed conditions upon or variances from the contractual terms the government had specified.

...

Responsiveness is determined by reference to when they are opened and not by reference to subsequent changes in a bid. Allowing a bidder to modify a nonresponsive bid when, upon opening the bids, it appears that the variations will preclude an award, would permit the very kind of bid manipulation and negotiation that the rule is designed to prevent.

Based on the evidence presented, the Hearings Officer finds that Petitioner's exception to the liquidated damages provision of the Special Conditions involved price, and as such, was a material deviation from the bid solicitation. Accordingly, the Hearings Officer concludes that Petitioner's bid was non-responsive and was properly rejected. Respondent's rejection of Petitioner's offer to withdraw its exception after bid opening was

also proper. The argument that Petitioner may be awarded the contract because the IFB only required that the award be to the lowest responsible bidder is rejected because the law requires that a competitive sealed bid, which IFB No. 2190 was, be awarded to the lowest responsible and responsive bidder. *See*, HRS § 103D-302. Petitioner's contention that the solicitation did not specify a delivery time is untimely as protests based upon the content of the solicitation cannot be considered unless it is submitted in writing prior to the date set for the receipt of offers. *See*, HRS § 103D-701. Petitioner failed to prove by a preponderance of the evidence the other arguments cited in its October 21, 2005 protest.

Petitioner also contended that Respondent's award of the contract to Draeger was improper. However, Petitioner does not have standing to contest Respondent's award of the contract to Draeger because Petitioner's bid was properly rejected as non-responsive. As such, Petitioner has no realistic expectation of being awarded the contract and is not "aggrieved in connection with the solicitation or award of the contract." *See*, Hawaii Revised Statutes ("HRS") § 103D-701(a), *Hawaii Newspaper Agency, et al. v. State Dept. of Accounting and General Services, et al. and Milici Valenti Ng Pack v. State Dept. of Accounting and General Services, et al.*, PCH-99-2 and PCH-99-3 (consolidated) (April 16, 1999). Accordingly, it is unnecessary to address Petitioner's contentions that Draeger's bid was unresponsive to the IFB. However, even if Petitioner was found to have standing to contest the award of the contract to Draeger, pursuant to HRS § 103D-701(a), Petitioner's protest was untimely as it was not made within five working days after October 18, 2005, when the Notice of Award was posted, or five working days after November 3, 2005 (the date Petitioner received a copy of Draeger's bid) when Petitioner knew or should have known of the facts giving rise to the protest.<sup>1</sup>

#### IV. DECISION

Based on the foregoing considerations, the Hearings Officer finds and concludes that Petitioner was not a responsive bidder and accordingly, that Petitioner failed to prove by a preponderance of the evidence that Respondent's rejection of its bid was improper and not in

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<sup>1</sup> Although Respondent agreed to allow Petitioner to file the second protest and not object to the timeliness of the protest, this is a jurisdictional matter which may be raised *sua sponte* by the Hearings Officer. *See, Hawaii Newspaper Agency and Milici Valenti Ng Pack, supra.*

accordance with the Constitution, statutes, regulations, and the terms and conditions of the solicitation.

DATED: Honolulu, Hawaii, January 9, 2006.



SHERYL LEE A. NAGATA  
Administrative Hearings Officer  
Department of Commerce  
and Consumer Affairs